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No. 1156

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOSE ESCOBAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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A four-count indictment was filed against petitioner in the Western District of Texas charging him with knowingly making and subscribing false income tax returns for the years 1957, 1958, 1959 and 1960, in violation of Section 7206(1) of the Internal Revenue Code, 26 U.S.C. 7206(1) (Pet. 17–19).

The evidence at the trial, consisting principally of a bank-deposit computation (R. 386), showed that the returns understated taxable income in the following amounts for the listed years: 1957, $1,022.47; 1958, $5,650.79; 1959, $6,077.50; and 1960, $4,862.14 (R. 400–404).[1] The jury acquitted petitioner on the first

[1] "R." references are to the two volumes of the printed record in the court of appeals. References to the supplemental record in that court will be designated "Supp. R."

count, but convicted him on the other three; he was fined $3,000 and sentenced to imprisonment for two years, the first six months to be served and the remainder to be suspended (R. 524, 529–531, 636). The court of appeals affirmed (Pet. 20–31).

Petitioner's contentions present neither a conflict of decisions nor any other basis for further review by this Court.

1. There is no merit to the contention (Pet. 2–3, 6–11) that petitioner should have been prosecuted and sentenced for a misdemeanor under Section 7207 of the Internal Revenue Code, 26 U.S.C. 7207, rather than for a felony under Section 7206(1). His premise—that each statute covers the offense charged here—is incorrect. A conviction under Section 7206 (1) requires proof, and the indictment here charged, that the defendant subscribed a return "verified by a written declaration that it is made under the penalties of perjury * * *," a factor that is not an element of a misdemeanor charge under Section 7207. Petitioner admitted this below,[2] where he argued that the

[2] Petitioner's brief in the court of appeals said (p. 19):

"Examination of the felony statute § 7206(1) discloses that it contains an element not required by § 7207 * * * [*i.e.*] subscribing a return 'verified by a declaration that it is made under the penalties of prejury.'* * *

The result is that * * * the two statutes do not cover precisely the same ground."

[3] The court of appeals affirmed the trial court's refusal to give the instruction since there was no factual dispute as to the added element of Section 7206(1), the "perjury declaration" (Pet. 26–28). See *Sansone* v. *United States*, 380 U.S. 343, 349–350, 354–355.

The question asserted here was raised (at p. 20 of the brief below):

"* * * as an alternative * * * [i]n the event the law is that

trial court should have charged the jury as to the lesser included offense of Section 7207.

2. The indictment was not insufficient, as petitioner contends (Pet. 3, 11–13), because it failed to allege that the return had actually been filed in the Western District of Texas. The indictment charged that petitioner "did willfully and knowingly make and subscribe" false returns within the Western District. This use of the statutory language is ordinarily sufficient as long as it clearly sets forth the elements of the offense. *Russell* v. *United States,* 369 U.S. 749, 765; *Hoover* v. *United States,* 358 F. 2d 87, 88 (C.A. 5), certiorari denied, 385 U.S. 822; *Worthy* v. *United States,* 328 F. 2d 386, 392 (C.A. 5). Petitioner does not explain how he was prejudiced by the form of the indictment. He was adequately apprised of what he must be prepared to meet. *United States* v. *Debrow,* 346 U.S. 374, 376. Any doubt could have been resolved by a request for particulars. Had venue been improper—and the record shows it was not (R. 38, 130)—petitioner knew all the facts necessary to raise the point.

3. It is not correct (see Pet. 3, 13–15) to say that the "two witness" rule of perjury cases should be applied to prosecutions under Section 7206(1). Although Section 7206(1) applies to returns which

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§ 7206(1) and 7207 require the same elements, cover precisely the same ground * * *."

The court of appeals did not discuss this argument, as petitioner points out (Pet. 5, 7), because it ruled that the two statutes did *not* cover the same ground.

have been verified "under the penalties of perjury," the essential element of perjury is absent since the returns are not made under oath. The courts have consistently refused to apply the "two-witness" rule to other false statement statutes, such as 18 U.S.C. 1001, which are essentially similar to Section 7206(1). *E.g., Marzani* v. *United States,* 168 F. 2d 133, 141–142 (C.A. D.C.), affirmed by an equally divided court, 335 U.S. 895; *United States* v. *McCue,* 301 F. 2d 452 (C.A. 2), certiorari denied, 370 U.S. 939; *United States* v. *Killian,* 246 F. 2d 77 (C.A. 7); *Fisher* v. *United States,* 254 F. 2d 302 (C.A. 9), certiorari denied, 358 U.S. 895; *Sells* v. *United States,* 262 F. 2d 815 (C.A. 10), certiorari denied, 360 U.S. 913. Even in actual perjury prosecutions, the "two-witness" requirement may be modified where the proof of falsity rests largely upon inference from circumstances, as it did here, *United States* v. *Wood,* 14 Pet. 430, 440–442; *United States* v. *Goldberg,* 290 F. 2d 729 (C.A. 2); 7 Wigmore, *Evidence,* § 2042, p. 281, n. 11, because such evidence does not involve the contest of one oath against another to which the two-witness rule is addressed, *Weiler* v. *United States,* 323 U.S. 606, 609.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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